82-1340

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

COMPANIA DE GAS DE NUEVO LAREDO, S.A.,
PETITIONER

VS.

ENTEX, INC.,
RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fifth Circuit err in holding that the act of state doctrine precluded consideration of Petitioner's claim that Respondent conspired with the government of Mexico to unlawfully take control of Petitioner's assets when in fact the Mexican Government waived the act of state defense by sending Petitioner a letter allowing it to prosecute causes of action "before any authority, whether it be National or Foreign" and authorizing Appellant "to initiate efforts to terminate said possession", and in holding that an exception to the act of state doctrine does not exist when governmental acts in question were procured through corruption?

2. Did the United States Court of Appeals for the Fifth Circuit err in not holding that the Texas Railroad Commission's Interim Order of September 27, 1973, in Docket 500, does not affect the price of natural gas sold to Appellant because it is gas sold in foreign commerce?

3. Did the United States Court of Appeals for the Fifth Circuit err in holding that Respondent had no fiduciary duty and obligation under its implied covenant of good faith and fair dealing to attempt to collect from United Gas Pipeline Co., a guarantor, before passing through increases in cost of gas to Petitioner?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U. S. CONSTITUTION

Statutes

Texts

Law Reviews

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix A, infra, pp. App. 1-26) is unreported. The opinion of the United States District Court for the Southern District of Texas, Laredo Division, (Appendix B infra, pp. App. 27-28) is unreported. The Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Texas, Laredo Division (Appendix C, infra, pp. App. 29-56) is unreported.

JURISDICTION

The order of the United States Court of Appeals for the Fifth Circuit denying Petitioner's Petition for Rehearing was entered on October 21, 1982 (Appendix D , infra, pp. App. 57). The jurisdiction of this Court is invoked under 28 U.S.C. 2101(c).

STATUTORY AND CONTRACTUAL PROVISIONS

The pertinent provisions of the statutes, the contract and the letter from the Mexican Government involved are set forth in Appendix E , infra, pp. App 58-70 .

STATEMENT OF FACT

At the time the suit arose, Petitioner was a privately owned company organized under the laws of Mexico, and was engaged in supplying gas to the City of Nuevo Laredo in the Republic of Mexico. Respondent, an American natural gas distributing company operating mainly in intrastate commerce in Texas, Louisiana, and Mississippi, had a long-standing contract to export gas to Petitioner. Petitioner and Respondent's predecessor, United Gas Corporation, entered into a contract on May 26, 1944, whereby United Gas Corporation would sell gas to Petitioner for distribution and consumption in the Republic of Mexico. On January 26, 1945, the Federal Power Commission,1/ in Docket No. G-103, entered its Order authorizing the exportation of natural gas from the United States

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1/ The Federal Power Commission was the predecessor of the Federal Energy Regulatory Commission. For simplicity, both will be referred to as "the Commission."

to a foreign country, said authorization being pursuant to and in accordance with the terms and conditions of the contract dated May 26, 1944 between the United Gas Corporation and Petitioner. The contract was subsequently assigned by United Gas Corporation to United Gas, Inc., which later changed its name to Entex, Inc.

The parties (or their predecessor) amended2/ the 1944 contract several times.3/

2/ The Commission did not approve or review any of these amendments. Indeed most were not filed with the Commission. Only the 1944 contract was approved. The Respondent, a United States corporation, had the burden to file any increases in its price of gas sold to Petitioner with the Commission. In the situation at bar, Respondent is presumed to have a greater knowledge than Petitioner in matters relating to the regulatory pre-requisites and requirements of the Commission, a United States entity. This point is important because of the "filed rate" doctrine which is raised later in this petition.

3/ All contracts, amendments and supplemental agreements between Petitioner and Respondent or Respondent's predecessor were prepared by Respondent, Respondent's predecessor or their attorneys.

As amended, section VII of the contract, which governed the rate to be paid for the gas sold under the terms of the contract, called for a "base rate."4/ Any increase or decrease in the base rate was to become effective in sixty days after the seller advised the buyer to that effect in writing. The buyer had the right, after February 1, 1973, to terminate the contract by written notice to seller not less than thirty days prior to the date the increase was to take effect. The seller also had the right to suspend deliveries of gas upon a breach by giving the buyer a similar notice in writing.

A 1968 amendment included "pass through" provisions which allowed the seller to adjust the base rate upward or downward to reflect, inter alia, the cost of its gas purchases. These pass through adjustments were included in the fixed rate automatically, and did not require the sixty

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4/ The base rate was initially fixed at $.34 per 1000 cubic feet of gas (Mcf), and was increased to $.54 per Mcf in 1975.

days written notice for a rate increase or decrease.

On June 25, 1970, the Commission, in Docket No. CP 70-262, issued its Permit authorizing the Respondent's predecessor to continue to operate and maintain the facilities on the U. S. Mexico Border at Laredo, for exportation of gas but ". . . only in the amount, at the rate, and in the manner authorized by the Commission. . ." No effort has been made by Respondent to have the Commission approve an increase in the 1944 rate.

In 1973, the Texas Railroad Commission, in Docket 500, voided Respondents' contracts with its supplier, the Lo-Vaca Gathering Company ("Lo-Vaca"), and substituted a price formula substantially raising the cost of gas to all of Lo-Vaca's customers, including Respondent. Respondent in turn "pass through" these increases to Petitioner, resulting in a substantial rise in the cost of gas to Petitioner. Petitioner became delinquent in its account with Respondent beginning in 1974. On February 25,

1975, Respondent gave Petitioner sixty (60) days' notice in writing, pursuant to the terms of the contract, of a rate increase to $.54 per Mcf. Said rate increase was not approved by the Commission. By 1976, the arrearage had become significant, and Respondent sent a letter to Petitioner and to various officials of the Mexican government on the federal and state levels informing them that, unless the account was paid for, Respondent intended to suspend deliveries of gas.

On the date before Respondent was to suspend service, Petitioner filed suit in the United States Court for the Southern District of Texas to enjoin Respondent from suspending gas deliveries. The Court temporarily restrained Respondent from discontinuing its gas deliveries. Petitioner, however, was required to post bond to cover such future deliveries of gas. In the meantime, Pemex, Mexico's government-owned and operated petroleum gas corporation, began supplying gas to Petitioner, thereby reducing the demand for imported gas. Moreover, on July 13, 1976, the Mexican government appointed an

"intervenor" and took immediate, total, and temporary possession of Petitioner's assets and rights in Mexico. On July 23, 1976, Petitioner filed a complaint with the Commission seeking to prohibit Respondent from terminating service. On August 18, 1976, the District Court for the Southern District of Texas stayed the suit against Respondent pending the outcome of the administrative proceeding.

On February 15, 1977, the Administrative Law Judge ("ALJ") ruled against the Petitioner. On Appeal, the District of Columbia Court of Appeals affirmed the ALJ's holding. Compania De Gas, etc. vs. Federal Energy Regulatory Commission, 606 F.2d 1024 (D.C.Cir. 1979).

Following resolution of the proceedings in the District of Columbia, the initial suit in Texas proceeded on both the tort and the contract claims. Petitioner claimed, among other points, that: (1) Respondent conspired unlawfully with various officials of the Republic of Mexico to obtain control of Pettitioner's assets. (2) The Texas Railraod Commission's order in Docket 500 had no effect on the price of gas charged to Petitioner, because of its foreign

commerce nature. (3) The pass-through provision was unconscionable in violation of Texas commercial law. (4) Respondent had a duty to seek and collect the rate increases from Lo-Vaca's predecessor, United Gas Pipeline, a guarantor, before it passed them on to Petitioner.

On October 7, 1980, the district court granted Respondent's motion to dismiss the tort claim, holding that the act of state doctrine barred all inquiries into the alleged conspiracy. Following a trial on the contract claims, the court, on February 17, 1981, denied all relief to Petitioner, and granted Entex's counterclaim for $937,035.18 for overdue payment, together with $297,723.70 in accrued interest, and $5,000.00 in attorney's fees.

On April 25, 1981, Petitioner appealed to the United States Court of Appeals for the Fifth Circuit. On September 24, 1982, said Court of Appeals affirmed the district court. Petitioner timely petitioned for a rehearing and on October 21, 1982, said Court of Appeals denied Petitioner's request for rehearing. Petitioner now submits this its Petition for Certiorari to this Honorable Supreme Court of the United States of America.

EXISTENCE OF JURISDICTION BELOW

Petitioner filed its Original Complaint for accounting and injunction on June 30, 1976 in the District Court for the Southern District of Texas, Laredo Division. Jurisdiction was founded on 28 USCA §1332 in that there existed complete diversity of citizenship between Petition and Respondent and the matter in controversy exceeds $10,000.00, exclusive of interest and costs.

REASONS FOR GRANTING THE WRIT

In this case there are several important questions of federal law which have not been, but should be, settled by this Court.

I.

The first important question of federal law that needs to be reviewed by this Court involves the act of state doctrine. Respondent submits to this Court that when governmental acts in question are procured through corruption then an exception to the act of state doctrine exists.

In Dominicus Americano Bohio v. Gulf & Western Industries, Inc., 473 F.Supp. 680 (S.S.N.Y. 1979),

an individual and a number of corporations affiliated in an endeavor to establish hotel and condominium accommodation in the La Romana section of the Dominican Republic sued competitor, latter's subsidiaries and the Dominican Tourist Information Center, and among other things alleged Sherman Act violations. The Court held that the act of state doctrine would not apply if it is alleged that the government's acts in question were procured through corruption. See Hunt v. Mobil Oil Corp. , 550 F.2d 68 at 79; McManis, "Questionable Co porate Payments Abroad: An Antitrust Approach", 86 YALE L.J. 215 (1976) at 236-237; Note, "Sherman Act Jurisdiction and the Acts of Foreign Sovereigns", 77 COLUM.L.REV. 1247 (1977) at 1262. In the present case, Respondent conspired with officials of the Republic of Mexico to unlawfully take control of Petitioner's assets. Therefore, the act of state doctrine should not apply because of the acts of corruption involved.

But the court of appeals below like the Hunt court refuses to address the merits of the corruption acts issue, and simply concludes (in order to avoid the corruption acts issue) that the Mexican

government, by taking possession of Petitioner's assets, acted in an emergency to insure that the citizens of Nuevo Laredo receive uninterrupted service of natural gas.

There have been at least two courts of appeal that have dodged the issue of corruption as an exception to the act of state doctrine. Since the courts of appeal across our nation keep dodging this issue, it is time for this Court to review this matter.

The policy underlying the act of state doctrine is that courts should abstain from action which hinders the executive branch of the government in the conduct of foreign relations and which might imperil amicable relations with other nations. Oetjen v. Central Leather Co. 246 U.S. 297, 62 LED 726, 38 S.Ct. 309; Jimenez v. Aristequieta 311 F.2d 547 (5th. Cir., FLA) stay den, 314 F.2d 649; cert den 373 US 914, 10 LED 2d 415, 83 S.Ct. 1302; reh den 374 US 858, 10 LED 2d 1083, 83 S.Ct. 1867. If this Court holds that an exception of the act of state doctrine exists when governmental acts in

question are procured through corruption, then this might even enhance relations with other nations in that nations, through their civil courts, will be able to fight, or at least expose, corruption in governmental posts. At the other extreme, allowing this exception will not more imperil amicable relations with other nations than does the Corrupt Practices Act (CPA).5/ In fact, the CPA is in part the very same exception to the act of state doctrine that Petitioner is requesting this Court to hold -- the issue of governmental acts in question procured through corruption--except that the CPA involves criminal proceedings. Petitioner would submit to this Court that under the CPA, the U.S. Justice Department would do more harm to international relations than would the corruption action exception Petition is seeking because the CPA involves criminal proceedings which includes the investigation and prosecution of foreign governmental officials.

It is ironical that the court of appeals below would, at this time, refuse to address the

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5/ Pub. L. No. 95-213, 91 Stat. 1494 (1977) codified in scattered sections of 15 U.S.C.).

corruption action exception Petitioner is currently seeking, when at this very same time, the Southern District of Texas is using the CPA to investigate and prosecute Petroleos Mexicanos (Pemex) officials involved in accepting bribes from a United States company. Is it fair and just that only the U.S. Justice Department, under the CPA, can have an exception to the act of state doctrine to investigate and prosecute corrupt foreign officials in criminal proceedings and yet in the very same type of corrupt actions, a company does not have recourse to civilly sue foreign officials involved in corruption? Should Respondent be allowed to hide from judicial inquiry of the corruption allegation because of act of state doctrine? Petitioner unequivocally says no to this special and important question of federal law, especially at this time that the United States and the Republic of Mexico (President Miguel de la Madrid's recent pronouncements on his goal to fight corruption in Mexico) are so concerned about corruption in governmental posts. An exception to the act of state doctrine must exist when governmental acts in question are procured through corruption.

It is important that this Court hold that a foreign state can voluntarily waive the act of state doctrine and thus allow another state's courts to take judicial inquiry into the validity or propriety of the acts of said foreign state. In the present case, the Republic of Mexico has unequivocally consented to an inquiry into the seizure of Petitioner's assets in its letter to Petitioner. (App. E , infra, pp. App 67-70). The letter not only authorizes Petitioner to "prosecute causes of action "before any authority whether it be National or Foreign", but also authorizes it "to initiate efforts to terminate said possession" which refers to the seizure. The court of appeal below has overlooked the last phrase of said letter granting such authority. Any such efforts to terminate said seizure obviously involves an inquiry into the validity of the act of the foreign government. Petitioner has been authorized to do just that before "any authority whether it be National or Foreign". The Republic of Mexico has unequivocally consented to such an inquiry by any United States court,

which, of course, includes this Court.

Application of the act of state doctrine, in this case, only benefits the wrongdoer, Respondent who procured such seizure through corruption. This is clearly not the underlying policy of the act of state doctrine.

The court of appeal below states that the clear and unambiguous statement by the Mexican government that it would not object to a judicial examination of its public act is but one of the many factors considered by courts in determining the applicability of the act of state doctrine. Why should other factors be taken in consideration when the Mexican government itself has unequivocally consented to an inquiry to its actions by any United States court?

The court of appeals below also holds that the facts of this case indicate that the letter cited by Petitioner does not constitute a waiver of the act of state defense by the Mexican government. The court of appeals does not specifically state what facts of the case indicate that said letter does not constitute a waiver of

the acts of state doctrine by the Mexican government. Petitioner cannot find the "facts of the case" that support the court of appeal's conclusion. The letter is the fact of the case that constitutes a waiver of the act of state doctrine by the Mexican government.

Furthermore, if there is still a question of the meaning of said letter, the Mexican government should be allowed to elaborate or explain the contents by making a general appearance at a United States court. The case of D'Angelo v. Petroleos Mexicanos, 331 A.2d 388, holds that a foreign state will be required to make a general appearance and is entitled to a defense based upon the act of state doctrine, but only when it pleads and proves that such defense is applicable. Petitioner contends this is the proper approach that must be taken by United States courts. The Mexican government should be required to make a general appearance in a United States court and only there it should plead and prove that the act of state doctrine is applicable if it so desires because in this case it has already waived said act by the letter that allows any

authority, be it national or foreign, to inquire into the acts of the Mexican government involving the seizure of Petitioner's assets.

II.

Another important question of federal law that needs to be settled by this Court involves the issue of federal preemption over natural gas prices sold in foreign commerce.

The Respondent charged the Petitioner more than the contract price for gas delivered to the Petitioner apparently because of the Order in Docket 500 of the Railroad Commission of the State of Texas. However, the Natural Gas Act, 15 USCA §717 et seq. preempts regulatory powers over the transportation and sale of natural gas in interstate and foreign commerce. Public Utilities Commission v. United Fuel Gas Co., 317 U.S 456 LED 396. The Railroad Commission of the State of Texas, therefore, has no authority over gas sold to the Petitioner, same being in foreign commerce. Just as a State has no authority, either directly or indirectly, to fix prices at which natural gas is sold in inter-

state commerce, See Natural Gas Act, 15 USCA §717 et seq; U.S. CONST. art. 1, §8, cl. 3 (Commerce Clause); and Federal Power Commission v. The Corporation Commission of the State of Oklahoma 363 F.Supp. 522 (1973), a State has no authority, either directly or indirectly, to fix prices at which natural gas is sold in foreign commerce.6/ It follows, therefore, that the September 27, 1973 order of the Texas Railroad Commission can have no effect on gas sold to the Petitioner; only an order of the Federal Power Commission (hereinafter known as the Commission) can affect such gas.

On January 26, 1945, the Commission, in Docket No. G-103, entered its Order authorizing the

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6/ In largest part, the cases defining the implied prohibitions of the Commerce Clause deal with State regulation of interstate commerce, since most States have greater opportunities and temptations to impinge on commerce with other States than with foreign countries. But nothing in the cases suggests, and there is no reason to believe, that they do not apply equally to foreign commerce. Perhaps a fortiori, and perhaps the limitations on the States would be more stringent in regard to foreign commerce. Further, some of the cases that define what the Commerce Clause required of the States in fact involved foreign commerce. See, City of New York v. Miln 11 Pet. 102 (U.S. 1837) and The License Case 5 How. 504 (U.S. 1847).

exportation of natural gas from the United States to a foreign country, said authorization being pursuant to and in accordance with the terms and and conditions of the contract dated May 26, 1944 between United Gas Corporation and Petitioner.

On June 25, 1970, the Commission, in Docket No. CD70-262, issued its Permit authorizing the Respondent's predecessor to continue to operate and maintain the facilities on the U.S. Mexico Border at Laredo, for exportation of gas but ". . . only in the amount, at the rate, and in the manner authorized by the Commission..." (Emphasis added).

More importantly, the recent case of Arkansas Louisiana Gas Company v. Hall, 453 U.S. 571, 101 S.Ct. 2925, 69 L.Ed 2d 856 (1981), holds that under the "filed rate doctrine", a regulated entity is forbidden from charging rates for its services other than those properly filed with the appropriate federal regulatory authority.7/ In the present

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7/ In this case, the appropriate federal regulatory authority is the Federal Energy Regulatory Commission (the Federal Power Commission's successor).

case, the only filed and approved rate establishing the amount to be charged for said gas was filed in 1944. No effort was made by Respondent to have the Commission approve an increase to the 1944 rate. It is not the Petitioner's fault that Respondent slept on its rights. Therefore, under the filed rate doctrine, Respondent has overcharged Petitioner because the 1944 rate is the only rate filed with the Commission. Furthermore, Arkansas Louisiana Gas Company holds that when there is a conflict between the rate filed with the Commision and a contract rate, the file rate controls.

Furthermore, Title 15 §717(a), USCA provides:

". . . the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. June 21, 1978, c. 556, § 1, 52 Stat. 821; March 27, 1954, c. 115 68 Stat." (Emphasis added)

Title 15 §717b, USCA provides:

"After six months from June 21, 1938 no person shall export any natural gas from the

United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate. June 21, 1938, c. 556, §3, 52 State. 822." (Emphasis added).

International trade and intercourse are commonly regulated by federal statute or treaty, and these are supreme law binding on the States. The United States Supreme Court has held that in addressing to Congress the power "to regulate commerce with foreign Nations, and among the several states," the Constitution also spoke of words of prohibition to the States. The principal case establishing this doctrine was Cooley vs. Board of Wardens of Port of Philadelphia, 12 How. 299 (1851). The Constitution did not leave the States wholly free to act in regard to interstate or foreign commerce until prevented by a

act of Congress, for Congress could not anticipate or deal with the myriads of state actions that might infringe the national interest.

Though section 717(b) of the National Gas Act states that the Act's provisions apply to natural gas in interstate commerce, sections 717(a) and 717(b) of the Act and the Cooley doctrine lead to the logical conclusion that the Commission has the authority to regulate gas flowing in not only interstate commerce but, also in foreign commerce. This Court must settle the important question of federal law which involves the preemption of state law by federal law when gas is sold in foreign commerce. International trade should be regulated by federal statute or treaty and these should be supreme law binding on the States, even in the sale of gas across international boundaries. Furthermore, the Commerce Clause of the United States Constitution must be respected and adhered to by a state gas agency. The Commerce Clause limits the States from infringing on foreign commerce. This Court must reiterate these principles.

III.

There is one more important question of federal law that must be reviewed by this Court. Petitioner submits to this Court that Respondent had a duty to attempt to collect the increases in the price of gas from the predecessor of Lo-Vaca, United Pipeline, Inc., before it passed such increases to Petitioner, and further, that because it had not made any such attempt, it could not collect the increases. Petitioner contends that such a duty arises from a clause in the contract between United Gas Pipeline and Respondent, which states that if one of the parties assigned its interest to another (as United did to Lo-Vaca), then that party would cause the acquiring entity to faithfully perform all the obligations created by the contract.

Respondent as a seller of the natural gas to Petitioner, the buyer, had a fiduciary duty to attempt to collect from United Gas Pipeline Co. before passing through increases in cost of gas to Petitioner. Respondent did not receive a "blank-check" from Petitioner.

United Gas Pipeline Co.'s contract with United Gas Corporation, Respondent's predecessor, states as follows:

"If all or any part of Seller's pipeline system through which the gas hereunder is delivered to Buyer is voluntarily sold or exchanged by Seller and Seller will thereby be rendered unable to supply to Buyer any gas which it is obligated to supply hereunder, then and in such event, Seller agrees that it will cause the person, firm, or corporation so acquiring such property to take and hold the same subject to this agreement and subject to the obligation fully and faithfully to perform all of the obligations created by this agreement applicable to the property sold or exchanged, and Seller further agrees that it will incorporate appropriate covenants to this effect in any act of conveyance or instrument of transfer which may be executed by it."

This provision is a general restatement of the universal proposition that a party to a contract cannot escape its obligations by assigning the contract to another. Walker v. Mills 182 Okla. 480, 78 P2d 697; Grant v. Harver, 29 Ariz. 41, 239 P. 296; Southern P. Co. vs. Butterfield 39 Nev. 177, 154 P. 932; See 6 AM.Jr. 2d, Assignments, §110 (1963); and V.T.C.A., Bus. & C. §6.610 (a) which states:

"(a) A party may perform his duty through a delegate unless otherwise agreed or unless the

other party has substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach."

More importantly, the contract provision, supra, is clearly a guarantee by United Gas Pipeline Co. to Respondent's predecessor, United Gas Corporation. The assignor becomes a guarantor of the assignee's performance. The court of appeal below properly recognized this point in its opinion.

27 Tex.Jur. 2d, Guaranty §1 (1961 and Supp. 1980) defines "Guaranty" as

> ". . . a promise of one person to perform an act of the same content and kind as another is contractually bound to the promisee to perform, or a promise to pay compensation for the other's performance, the promise being conditional on the latter's nonfulfilment of his duty."

It is, therefore, clear that when United Gas Pipeline Co. assigned its contract to Lo-Vaca Gathering Company, it was and is obligated to Respondent for Lo-Vaca's performance. Since Lo-Vaca breached the contract, Respondent has recourse against United Gas Pipeline Co. under the above quoted contract provisions and statutory authority.

Respondent's cost of gas, therefore, should not increase unless and until such time as it exhausted all efforts to collect on the guarantee of United Gas Pipeline Co. and was unable to collect.

Furthermore, at the time the "pass through clause" was added to Petitioner's contract, all the parties were familiar with Respondent's long term contract for gas at a fixed price and it was with this knowledge of the surrounding circumstances and the fact that it had no alternative source of gas that Petitioner accepted such modification to its contract. Under the circumstances, it is inherently unfair to permit Respondent to impose the burden of Lo-Vaca's breach on Petitioner rather than on United Gas Pipeline who was guaranteeing such performance to Respondent. The implied covenant of good faith and fair dealing does not permit such conduct.

In Citizens Nat. Bank of Orlando vs. Vitt, 367 F.2d 541, appeal after remand, 414 F.2d 696, and in Lichter v. Mellon-Stuart Co., 193 F. Supp. 216, motion denied, 196 F. Supp. 149, aff'd., 305

F. 2d 216, the courts held that in every contract between a prime contractor and a subcontractor, the implied promise exists on part of the prime contractor that he will do nothing to prevent, interfere with, or hinder the subcontractor in this performance or increase costs thereof. In this case, there also existed an implied promise on part of the Respondent: to attempt to keep the costs of gas from increasing and to attempt to collect from United Gas Pipeline Co. before passing through increases in cost of gas to the Petitioner. By not attempting to collect from United Gas Pipeline Co., Respondent breached its fiduciary duty and implied covenant and promise of good faith and fair dealing of attempting to keep the cost of gas from increasing.

Furthermore, the "pass-through" provisions of the contract in question are not a "blank-check."

V.T.C.A., Bus. & C. §1.203 states:

> "Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement."

V.T.C.A., Bus. & C. § 1.201 (19) states:

> "'Good faith' means honesty in fact in the conduct or transaction concerned."

Respondent was under a duty to act in good faith, deal fairly and not use the "pass-through" provisions of the contract as a "blank-check".

Contrary to such duty, Respondent did not disclose the contractual guarantee to Petitioner. Petitioner, after filing this cause, learned of it in the course of discovery proceedings. Compliance with the "good faith" and "honesty" obligations imposed by law required Respondent not only to disclose such a guarantee to Petitionter but to pursue it.

The Court of appeal below holds that from the evidence presented in this case, that Respondent had no duty to attempt to collect the increases in gas prices from United Gas Pipeline for the benefit of Respondent prior to passing them through. Said court of appeal does not state what this evidence is and further does not produce any logical rationale to counter Petitioner's position. It admits it does no have any case at law to support or oppose Petitioner's position. Because of this lack of case law, it is appropriate that this Court review this special question of law since this type of situation is probably common across the nation.

CONCLUSION

This Court should review this case because of the three important questions of federal law which have not been, but should be, settled by this Court. For this reason and the above stated reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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BY: _____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Certiorari has been mailed to Mr. Walter Workman, One Shell Plaza, Houston, Texas 77002; Mr. George Goolsby, One Shell Plaza, Houston, Texas 77002; Mr. Hubert Gentry, Entex Room 1534, P.O. Box 2628, Houston, Texas 77001; and Mr. Raymond Goodman, 518 Matamoros, Laredo, Texas 78040, on this the 18th day of January, 1983, (three copies of the foregoing Petition were sent to Mr. Walter Workman and one copy to the other counsel of record.)

C. M. ZAFFIRINI